balancing. The Eleventh Circuit has not." Reply App. at 6a. Pickett's clear and consistent position regarding the rule of reason has been preserved in a meticulous record in both the district court and the court of appeals in anticipation of certiorari review. It is an unfortunate coincidence that, as Tyson asserts, "this Court lacks the benefit of the Eleventh Circuit's analysis" regarding the first question presented. Opp. at 2. Litigants in the Eleventh Circuit have lacked the benefit of that court's analysis for nearly a decade and, because the Eleventh Circuit has hewn to its inverted quick look analysis for so long, the only manner of resolving this untenable, "lopsided" split is certiorari review.

Second. Review in this Court is warranted because of the well-defined split of authority regarding what plaintiffs must prove in cases under the Packers and Stockyards Act. A recent report of the Inspector General (IG) of the United States Department of Agriculture underscores the importance of that deep and untenable split.

The IG discussed the enforcement of the PSA through the Packers and Stockyards Programs (P&SP) run by the Grain Inspection, Packers and Stockyards Administration (GIPSA), which is the administrative agency "responsible for: (1) maintaining fair trade practices in the marketing of livestock, (2) providing financial protection for participants in livestock transactions, and (3) ensuring open competitive marketing conditions for livestock and meat." Office of Inspector General, U.S. Dep't of Agric., Report No. 30601-01-Hy, *Grain Inspection, Packers and Stockyards Administration's Management and Oversight of the Packers and Stockyards Programs* 1 (Jan. 10, 2006) (hereinafter "*IG Report*"). The report discusses at length the substandard investigative and enforcement arms of GIPSA, and concludes that "competition and complex investigations were not being performed, and timely action was not being taken on issues that impact day-to-day activities." *IG Report* at i. The P&SP at GIPSA has "mate-

rial weaknesses" when it comes to "essential activities for administering and enforcing the" PSA. *Id.*

The report concludes that the inadequate administrative enforcement of the PSA has stunted the usefulness of the PSA:

> Since P&SP is not performing competition and complex investigations, no referrals are being made to the Office of the General Counsel . . . for formal administrative action. In February 2005, P&SP referred one competition investigation to OGC. The most recent referral prior to February 2005 was November 2002, over two years earlier. *OGC filed no administrative complaints against market participants for anti-competitive practices since 1999 due to the lack of referrals by P&SP.*

Id. at ii (emphasis added).

The administrative oversight function also had been corrupted because the agency was inflating its reports of investigations. *Id.* at 6. The Atlanta regional office, located at the home of the Eleventh Circuit, "climbed from last to first among the three regions [in the GIPSA enforcement statistics] by reclassifying over 300 routine activities as investigations." *Id.* at 7.

GIPSA, however, has long been deficient regarding its enforcement capabilities. In 1997, the IG determined that GIPSA did not have the capacity "for proper monitoring of the livestock procurement market for anti-competitive behavior," which led to a major reorganization of GIPSA. *Id.* at 2. In 2000, the Government Accountability Office determined that, even after GIPSA had completed its reorganization, two issues prevented the agency from investigating properly concerns regarding anticompetitive practices within the livestock markets: First, GIPSA did not involve its own attorneys in investigations; second, its investigative methods were "not suited for the more complex" anticompetitive practices that the packers were accused of employing. *Id.* at 3. The

agency's inadequacy harms all of the participants in the financial markets GIPSA should oversee which, according to the USDA, includes the $78 billion economic impact that comes from the cattle market. USDA Economic Research Service, *Background Statistics: U.S. Beef and Cattle Industry*, available at http://www.ers.usda.gov/news/BSECoverage.htm (last visited Mar. 1, 2006). In 2004 alone, there were "32.728 million head" of cows slaughtered in the U.S. *Id.*

The administrative mechanisms for enforcing the PSA are broken. Private parties, therefore, have been forced to litigate PSA cases to ensure that the promises in the PSA are not illusory. Congress understood that private parties would play a very important role in enforcement of the PSA when it clarified that there should be a private right of action under the statute. 7 U.S.C. § 209(b). As the petition shows, this Court has not spoken on the PSA in any meaningful way since that provision was added. Pet. at 12; *Mahon v. Stowers*, 416 U.S. 100, 94 S. Ct. 1626 (1974) (per curiam) (most recent Supreme Court case discussing the PSA). For more than thirty years, the courts of appeals have struggled with issues arising under the PSA without guidance from this Court.

There is no question that "Congress understood the sections of the [PSA] under consideration were broader in scope than the antecedent legislation. . . . [A]lthough Congress gave the Federal Trade Commission wide powers to prohibit unfair methods of competition, such authority is not as wide-ranging as that given to the Secretary of Agriculture under" the PSA. *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961). Because the agency responsible for enforcing the PSA is either unable or unwilling to enforce the PSA, this Court should ensure that private litigants can enforce the PSA which, as "remedial legislation," "should be construed liberally so as to effectuate the purpose of Congress." *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (citing *Stafford v. Wallace*, 258 U.S. 495, 521, 42 S. Ct. 397,

403-04 (1921)). The only avenue for effectuating the language of the statute, fulfilling the purpose of the PSA, and finally closing the broad split of authority among the courts of appeals is review by this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE IDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 96-A-1103-N

HENRY LEE "LEROY" PICKETT, *et al.*,
Plaintiffs,

VS.

TYSON FRESH MEATS, INC.,
Defendant.

VOLUME XIX

JURY TRIAL

BEFORE THE HONORABLE LYLE E. STROM, UNITED STATES DISTRICT JUDGE, and a jury, at Montgomery, Alabama, on Monday, February 9, 2004, commencing at 9:31 a.m.

* * * *

[3104] [MR. WHATLEY:] In the—in the whole rule of reason area—we're going to cross this bridge several times, Your Honor—the issue is not just that the defendant contends that it has legitimate business reasons. And if I could, I'd like to hand up the portion of Professor Areeda's treatise that deals with [3105] this issue and burdens of proof where there's a rule of reason question.

And the whole—first of all, we don't think—and we've expressed this before. We don't think that the rule of reason has any place in the Packers and Stockyards Act analysis, that what you ought to give the jury is the language of the statute

and not limit that through the rule of reason kind of instruction. And we object to the inclusion of the rule of reason kind of instruction. And we object to the inclusion of the rule of reason analysis, period.

If it is going to—secondarily, if it is going to be included, then number one, we think as discussed in the last full paragraph on page 2 of this section from Professor Areeda's treatise—and it's paragraph 1507b that I'm reading from, that I'm citing specifically—the way the analysis goes, once the plaintiff satisfies his burden of persuasion of the existence of a significant restraint, he will prevail unless the defendants introduce evidence sufficient to allow the tribunal to find that their conduct promotes a legitimate business objective. The plaintiff may rebut this by introducing evidence that the objective is illegitimate or that the restraint is not reasonably necessary to achieve it. And then it goes on to discuss balancing the—weighing and balancing the harm against the benefit in the course of the analysis.

The first thing, we submit, is that the defendant has to show—if we're going to put rule of reason in this—and [3106] we object to doing so; but if you are, the defendant has to show that what it is doing is necessary to the achievement of the benefit—

* * * *

[3118] MR. WHATLEY: And with that, I can turn to the verdict form. The—if I could hand this up, Your Honor.

THE COURT: Go ahead.

MR. WHATLEY: And Your Honor—

MR. HOPSON: Mr. Whatley, is that the same verdict form we've seen previously from you?

MR. WHATLEY: We've given you several, and I honestly don't know whether this was—this was on one we gave you or not. I think it was not.

MR. HOPSON: Thank you, sir.

MR. WHATLEY: We may have given it to you, but my best judgment is we did not.

* * * *

[3119] In terms of the use of captive supply, we think the question, again, is related to whether it was used to—with respect to IBP's purchases of fed cattle. We've given you language that we think gets to that point much more specifically in the proposed question we've given you.

In terms of the business justification, the issues we discussed before, I think if you're going to include that issue in here, number one, competitive justification has to come out. Number two, the burden is in the wrong place. Number three, there is no requirement that they show that the conduct was necessary to achieve the legitimate business reason. Number four, there is no possibility of us rebutting this in the ways that I discussed earlier, either by showing that it was not a legitimate business justification or that the conduct was—was not necessary—that it could be—the business justification could be achieved in a lesser—in another way that's less restrictive. And so you have to—if you're going to include that in here, you have to include those subparts, necessarily, [3120] to get down to the point in order to get to an end result that is consistent with the rule of reason as discussed in the case—in the cases under the Sherman Act and summarized by Professor Areeda.

* * * *

[3132] MR. JORGENSEN: On instruction 12, we get into the legal argument we've had from plaintiffs today. Let me just begin my response to that by saying we've litigated this whole case under certain, I think, well understood agreement about what the law is. We've all talked about the need to prove a national market or to define the relevant market, to

prove the relevant market to show either an actual anti-competitive effect upon that market or the potential for anticompetitive effect. And as subsets of those requirements, they need to show market power and the lack of any valid business justification.

Now, I'll say the defendant's view of your instructions, Your Honor, is that they accurately state the law in the vast degree. We have a few—a few little nicks, but not much.

THE COURT: Well, having heard the plaintiffs' objections, I'm not surprised by your response.

MR. JORGENSEN: Yeah. They don't—not all your instructions favor us. We wish the law were different in some instances, but they're very good—

THE COURT: What do you think about Mr. Whatley's objection with respect to who has the burden of going forward with the evidence on this issue of justification?

MR. JORGENSEN: I would just submit, Your Honor, that it would be an error for you to give any other instruction than the one you're giving. I've read the Areeda Treatise, not just [3133] the section you've been given, but the whole thing; and it is not followed in the Eleventh Circuit. The Eleventh Circuit has been very clear in what the burden is in the Eleventh Circuit. It's been very clear that it's different from the other circuits. And I've got the citations.

THE COURT: What cases are you relying on?

MR. JORGENSEN: Maris Distributing Company.

THE COURT: Give me the cite.

MR. JORGENSEN: 302 F.3d 1207, and the pinpoint cite is 1213. If I could just read the snippet, quote, Rule of reason analysis requires the plaintiff to prove, number one, an anticompetitive effect of the defendant's conduct on the relevant market and, number two, that the conduct has no

procompetitive benefit or justification, which is exactly how you framed it, Your Honor. The Eleventh Circuit—

THE COURT: That must have been the case I had in front of me. I didn't realize that.

MR. JORGENSEN: Yeah. The Eleventh Circuit has reaffirmed that, that holding. I'll just give you the citation. 72 F.3d—

THE COURT: What was 302 F.3d?

MR. JORGENSEN: Yeah. 302 F.3d 1207.

THE COURT: 72 doesn't confirm—

MR. JORGENSEN: Oh, I'm sorry. You're exactly right. Maris Distributing is affirming the first one. It starts in [3134] Southern Card, which is—no, let me back up. It starts with Levine, which is 72 F.3d.

THE COURT: What page?

MR. JORGENSEN: 1538 is the first page. 1551 is the pinpoint cite. That's 1996. Then it's reaffirmed in 1998 at 138 F.3d 869, pinpoint cite 876.

THE COURT: All right.

MR. JORGENSEN: And then affirmed again in 2002 in Maris Distributing, which is the 302 F.3d 1207, 1213. And we've cited all those, Your Honor, in our motion for judgment as a matter of law.

THE COURT: I knew I had the case. I just didn't realize it was 302 F.3d I was using. All right.

MR. JORGENSEN: Now, importantly, as we talked about both of these, the anticompetitive effects of the defendant's conduct, as the Eleventh Circuit says, on the relevant market and no procompetitive benefit or justification, the burden of both of those points, both of those elements, is on the plaintiff, as the Eleventh Circuit has made clear. And

interestingly, also importantly, the Eleventh Circuit does not use the balancing test that the plaintiffs urged upon you. The quote is that the conduct has no procompetitive benefit or justification.

Now, to be frank with Your Honor, in the rule of reason analysis outside of the Packers and Stockyards Act context, [3135] other circuits have used the balancing. The Eleventh Circuit has not. And within the Packers and Stockyards Act context, I'm not aware of any case that has used a balancing in terms of the procompetitive benefits and valid business justifications. In Glickman, as you pointed out, the Court found that IBP did not violate the PSA as a matter of law because it had a procompetitive benefit. And it said the benefit was, quote, a more reliable and efficient method of obtaining a supply of cattle.

But that's not the only case, Your Honor. Armour & Company held that the Seventh Circuit as well. That's 403 F.2d at page 725, is the exact section. And the quote is, Competitive justifications for a business plan negate its being unjust, undue, or unreasonable; again, without balancing. If you have a justification, you do not violate the PSA. Swift & Company, 105 F.2d. The pinpoint cite is 857-58. Again, they had a single valid business justification, and the finding of the violation was set aside. Griffin versus Smithfield Foods, 183 F. Supp. 2d, the pinpoint cite is 827 to 28.

Do you want me to continue, Your Honor, or is that enough?

THE COURT: That's enough.

* * * *

[3136] MR. JORGENSEN: Let me just address the argument that's made in response to this instruction that rule of reason is not in the case. You have rules before, Your Honor, that rule of [3137] reason is in the case; and we would assert—

THE COURT: Rule of reason will be in the case.

MR. JORGENSEN: Okay.

THE COURT: And I think Mr. Whatley understands that, too.

MR. JORGENSEN: Okay.

THE COURT: He needs to protect his record. He needs to make these objections now or he waives them.

MR. JORGENSEN: Right.

THE COURT: It's very important that he assert any objection that he feels he has to me; because after I read these instructions, I will invite counsel up to ask you if you have any exceptions or objections that you haven't previously voiced, something brand new that I should know about before I submit the case to the jury. And you'll be given an opportunity to make a record on that.

MR. WHATLEY: And you won't expect us to remake the same objections.

THE COURT: No, no. I don't want you to repeat anything you've done here. You will have—that's the purpose of this conference and why it's on the record, in order that we don't spend a long time at side-bar going back through everything we're going back through this afternoon.

* * * *

FEB 3 - 2006

No. 05-864

IN THE

Supreme Court of the United States

HENRY LEE "LEROY" PICKETT, *et al.*,
Petitioners,

v.

TYSON FRESH MEATS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICI CURIAE R-CALF USA AND 36 CATTLE PRODUCER GROUPS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of this Court, and with the written consent of the parties reflected in letters lodged with the Clerk, the undersigned submits this *amici curiae* brief on behalf of the Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA) and the following 36 groups representing cattle producers:[1]

Beartooth Stock Association; Calaveras County Cattlemen's Association; Cattle Producers of Washington; Cherokee County Cattlemen's Association; Colorado Independent CattleGrowers Association; Crowley-Lincoln-Kiowa Cattlemen's Association; Dakota Resource Council; Dakota Rural Action; Independent Beef Association of North Dakota; Independent Cattlemen of Nebraska; Independent Cattlemen's Association of Texas, Inc.; Intertribal Agriculture Council; Kansas Cattlemen's Association; Kit Carson County Cattlemen's Association; Lincoln County Stockman's Association; Madera County Cattlemen's Association; McPherson County Farmers Union; Merced-Mariposa Cattlemen's Association; Mississippi Livestock Markets Association; Modoc County Cattlemen's Association; Montana Cattlemen's Association; Navajo County Cattlemen's Association; New Mexico Cattle Growers Association; North Central Montana Stockgrowers Association; Northern Wisconsin Beef Producers Association; Oregon Livestock Producer Association; Powder River Basin Resource Council; South

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[1] Pursuant to Rule 37.6, *amici curiae* state that no counsel for any party has authored this brief in whole or part, and no person or entity other than the *amici curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

Dakota Stock Growers Association; Southern Colorado Livestock Association; Southwestern Colorado Livestock Association; Spokane County Cattle Producers; Stevens County Cattlemen's Association; Washington Cattlemen's Association; Washington County Stockmen's Association; West Carroll Cattlemen's Association; and Women Involved in Farm Economics.

R-CALF USA is a non-profit association representing over 18,000 U.S. cattle producers in 47 states across the nation. R-CALF USA's membership consists primarily of cow-calf operators, cattle backgrounders, and feedlot owners. Various main street businesses are also associate members of the group. R-CALF USA's mission is to represent the U.S. cattle industry in trade and marketing issues to ensure the continued profitability and viability of independent U.S. cattle producers. R-CALF USA itself was not a party to the case below. However, the certified class includes some R-CALF USA members and a number of R-CALF USA members testified at the trial. The 36 groups joining R-CALF USA in this *amici* brief are non-profit associations representing the interests of independent cattle producers at the local, state, and tribal level.

Each of the *amici curiae* has a substantial interest in supporting the subject petition. The decision below threatens to undermine severely the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 *et seq.*, (PSA), a statute Congress intended to protect cattle producers such as those represented by *amici*.

SUMMARY OF THE ARGUMENT

At issue is whether the Eleventh Circuit erroneously construed the Packers and Stockyards Act of 1921, *supra*, and thereby undermined the statute's objectives, when it held that any business justification for a challenged commercial practice would negate an otherwise actionable claim.

Clear expressions of Congressional intent, the manifest scheme of the Act on its face, and certain judicial decisions indicate that the PSA is, *inter alia*, a remedial statute designed to address unfair business behavior, not just promote the efficiency objectives of antitrust laws. Yet, the Eleventn Circuit construed the Act to require that a plaintiff must demonstrate that a business practice is absolutely anti-competitive in order to establish a violation. This undermines the statute's objectives.

Further, the decision below conflicts with decisions of other Circuit Courts that have also construed the PSA. The Circuits disagree whether the Act is intended primarily to promote market efficiency or is a distinctive body of regulation tailored to the meatpacking industry to address its concentrated structure and its propensity to unfair behavior. This Court should resolve the conflict.

A resolution is particularly compelling given the PSA and the industry it regulates are national in scope and operation. Moreover, the industry has undergone major change in recent years, as the Eleventh Circuit observed, and this Court has never addressed the Act's application to the business practices in issue in this case.

ARGUMENT

I. THE COURT SHOULD REAFFIRM THE PURPOSES OF THE PSA AND THEREBY REVIVE ITS REMEDIAL OBJECTIVES, WHICH THE ELEVENTH CIRCUIT HAS UNDERMINED.

A. Congress intended the PSA to promote multiple social goals, not just market efficiency.

Congress enacted the PSA to regulate the meatpacking industry. The Act was designed not only to prohibit anti-competitive and monopolistic practices, but also to protect livestock producers from unfair, deceptive, and manipulative practices by the meatpackers to whom the producers must sell. Thus the Act goes far beyond traditional antitrust concerns of efficiency and market competition. This is evident in legislative history, the structure of the Act itself, and certain judicial decisions. The Eleventh Circuit ignored these realities by reading the Act restrictively to prohibit only acts and behavior having an absolutely anti-competitive impact. The appellate court thereby undermined the purposes of the PSA.

First, as to Congressional intent, the reports that accompanied the initial PSA do not describe the circumstances or evils that Congress sought to address in the Act.[2] One statement makes clear, however, that the elaborate regulatory scheme was designed to:

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[2] There was elaborate discussion of the Act's constitutionality and Supreme Court cases on the Commerce Clause. *See generally* H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921). There was concern in 1921 whether Congress could so extensively regulate commerce.

> safeguard the interest of the public and *all* elements of the industry from the producer to the consumer without destroying *any* unit of it. [Emphasis added.]

H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921). Thus, protecting "unit[s]" was an objective.

Statements of individual Congressmen, however, filled the gap the reports left open. For example, Congressman Voigt alluded to the then-existing "Big Five" meatpackers (Swift & Co., Armour & Co., Morris & Co., Wilson & Co., and Cudahy Packing Co.) and saw the Act as necessary to confront the industry's "concentration." 61 Cong. Rec. 1863 (May 27, 1921). Congressman Tincher stated as follows: "Time has demonstrated that the business of producing meat in this country can not be carried on under existing conditions."[3] *Id.* at 1809 (May 26, 1921). Congressman Rayburn characterized the Act as giving the Secretary of Agriculture wider power than that of the Federal Trade Commission. *Id.* at 1806. These statements, it must be recalled, were made when the Sherman Act was already law.

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[3] Upton Sinclair portrayed these "conditions" in his classic 1906 novel, *The Jungle*. The book presents the packing industry, at the turn of the twentieth century, as characterized by predatory greed, where a handful of powerful packers exploited workers and dealt unfairly in multiple forms of business activity. It is widely recognized that Sinclair's novel played a role in prompting reform and extensive regulation of the industry. *See, e.g., Alvarez v. IBP, Inc.*, 339 F.3d 894, 897-98 (9th Cir. 2003) ("From the time that publication of Upton Sinclair's *The Jungle* provoked *** passage of the Meat Inspection Act of 1906, the meat packing industry has been one of the most regulated businesses in the United States."), *aff'd IBP, Inc. v. Alvarez*, 126 U.S. 514, 163 L. Ed. 2d 288 (2005).

Congress more directly discussed the Act's purposes in amendments in 1958. The House Report then stated as follows:

> The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of this Act is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. *The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock* and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small. [Emphasis added.]
>
> * * * * *
>
> The Act provides that meatpackers subject to its provisions shall not engage in practices that restrain commerce or create monopoly. *They are prohibited from buying or selling any article for the purpose of or with the effect of manipulating or controlling prices in commerce.* [Emphasis added.]

H.R. Rep. No. 85-1048, 85th Cong., 2nd Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213. The Report further clarifies that the PSA served objectives *in addition* to those embodied in the Sherman and the Clayton Acts. *Id.* at 1517. These further purposes were to address the problems Congress confronted in 1921.

The text of the Act itself further reflects its multiple concerns. First, on its face, it sets forth a detailed list of business practices that Congress wished to proscribe, and the provisions address many concerns other than maximizing market efficiency.[4] Second, like other "fair trade" statutes, the Act sought to protect *certain actors* ("units"),[5] particularly small cattle producers, who had to sell their livestock in a market dominated by powerful

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[4] The statute provides:

> It shall be unlawful for any packer *** to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> * * * * *
>
> (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices ***.

7 U.S.C. § 192. Note these prohibitions are stated as absolute bans, unlike the prohibition in § 192(c), which bars supply apportionment "if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly." No such limitation is present on the face of the statute regarding subsections (a) and (e). The decision below has the effect of inserting the limitation which Congress only chose to include in subsection (c) into all other parts of the section.

[5] *E.g.*, the U.S. antidumping law, currently in Title VII of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1673 *et seq.* This unfair-trade-practice statute provides relief for U.S. industries injured by *unfair* import pricing (*i.e.*, the pricing of imports below their "normal value"), such that the statute protects a class of *competitors*, not pure competition itself as might be the case of an antitrust law. Significantly, the original antidumping law was the Antidumping Act, 1921 (P.L. 67-10), which Congress enacted on May 27, 1921, less than three months before enacting the PSA on August 15, 1921.